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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 629.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

VS.

WILLIAM H. WEMYSS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

THE FACTS.

There is no dispute about the facts. Respondent Wemyss was a widower sixty-three years of age. He married Ellen Stokes More, a widow, on June 20, 1939. Mrs. More's former husband, E. L. More, died on February 9, 1934, leaving one son surviving. On June 6, 1927, and June 15, 1929, E. L. More executed certain trust inden-

tures to Nashville Trust Company creating trusts under the provisions of which upon his death the income from certain corporate stocks was payable to his widow, Ellen Stokes More, during her lifetime or *until her remarriage* (R. 23-24). When respondent Wemyss proposed marriage to Mrs. More she was unwilling and would not agree to marry respondent and thereby suffer the loss of her life income under the trusts created by her deceased husband unless respondent would contract with her to make good the loss. This agreement was required as a condition precedent to her consent to marry respondent.

The Tax Court made the following specific findings of fact:

> "Some time prior to May 24, 1939, petitioner made a proposal of marriage to Ellen Stokes More. She told him she would not be willing to marry him and lose her life income under the trusts created by her first husband unless he would enter into a pre-marriage contract with her to make good the loss."
> Record p. 10.

Mrs. More and respondent agreed on the final terms of the contract after discussing the number of shares of General Shoe Corporation stock which would be required to compensate Mrs. More for her financial loss resulting from her marriage to respondent. This appears from the following cross examination of respondent:

> "Q. When you were discussing with Mrs. More the proposed marriage, did she request you to transfer to her any particular assets or money of any particular value?
> A. Well, my assets were all in the form of General Shoe stock, so it had to be—
> Q. Did she ask that you agree to transfer to her any particular number of shares?

A. We discussed that and agreed on it.

Q. You mean she suggested a certain number?

A. Yes, sir.

Q. And you suggested a certain number?

A. Yes, sir. She suggested a given number.

Q. How did it happen that the number came out to be an odd number like No. 13189?

A. The certificate is written up that way.

Q. You mean you had decided on a number close to that amount?

A. Yes, sir.

Q. At the time you were discussing the proposed marriage, were you familiar with the provisions of the two trust instruments which have been introduced in evidence?

A. Oh, yes.

Q. Did you have any knowledge of the amount of income that had been accruing to Mrs. More from that source?

A. Yes, sir."

Record p. 25.

It was a part of the agreement that the contract be consummated and the stock in question transferred to Mrs. More prior to the marriage (R. 22). The contract was reduced to writing and was executed by both parties on May 24, 1939, and was duly acknowledged for registration before a notary public (R. 22). Respondent transferred the stock pursuant to the contractual obligation to Mrs. More *before the marriage*, on May 24, 1939, and the marriage took place on June 20, 1939. The parties caused the written contract to be recorded on June 21, 1939, in the Register's Office of Davidson County, Tennessee, where the parties resided (R. 27). Mrs. More was forty-four years of age at the time of her marriage to respondent (R. 22). The income accruing to her individually by rea-

son of this trust had averaged $5,484 per year, or approximately $457 per month, since the inception of the trust (Petitioner's Exhibit 4, R. 49).

OPINION OF THE CIRCUIT COURT OF APPEALS.

The basis of the opinion of the Circuit Court of Appeals for the Sixth Circuit in concluding that the transfer of the stock was not subject to the gift tax will appear from the following quotation from its opinion:

> "* * * The record reveals in actuality no semblance of a premarriage gift of stock by the petitioner to his affianced. She bargained with him at arm's length before she cut herself off by remarriage from her interest in the trust estate created by her first husband. She sustained a very real and substantial detriment as the consideration for her promise to marry the petitioner. This detriment was definitely measurable in money or money's worth. The circumstances that the money detriment which she sustained did not move to the benefit of petitioner except in the acquisition of the lady of his choice as wife does not lessen the business-like nature of the transaction. The tax court itself found no evidence of an actual donative intent upon the part of petitioner in transferring the stock."
>
> Record p. 56.

The court distinguished the present case from that of *Merrill* v. *Fahs, Collector*, No. 126, in this Court, as follows:

> "This case differentiates from those cases in which prospective husbands and wives have entered into prenuptial agreements as to the interest to be acquired by the lady in the property and estate of the gentleman. In these cases the prospective wife was agreeing to surrender only herself to the bonds of matrimony without an accompanying surrender of

any property owned by her. She was providing against the exigencies of matrimony by fixing a definite basis for her participation in the property or estate of the man she was about to marry. For example, see *Commissioner of Internal Revenue* v. *Bristol,* 121 F. 2d 129 (C. C. A. 1).

"Here the prospective wife was not contracting concerning the subject matter of her interest in the estate of the prospective husband. She was agreeing upon a present transfer made to indemnify her against loss of existing property rights which would ensue in consequence of her remarriage.

"Furthermore, the Wemyss transfer is completely disassociated from any indicia of an intent to avoid or reduce death taxes. The minds of the contracting parties at the time of the transfer were obviously upon their future life together and not upon the effect of the transfer in the event of the death of either. In no respect was the transfer made in contemplation of death."

Record p. 57.

In response to the Commissioner's insistence that a tax should be imposed upon the difference in values between the vested income surrendered by Mrs. More and the stock transferred to her by respondent, the Circuit Court of Appeals said:

"In our judgment, the law does not require that the difference in value between that which petitioner conveyed to his affianced and that which she surrendered in money or money's worth by marrying him be calculated and the excess value taxed under section 503. Compare *Herbert Jones* v. *Commissioner,* 1 Tax Court 1207; *Lasker* v. *Commissioner of Internal Revenue,* 138 F. 2d 989.

"What she surrendered in good faith was of quite substantial value in money's worth and was a sufficiently real consideration in money's worth to negative a gift-motive concept in the excess in value of the property transferred. * * *

"A donative intent followed by a donative act is essential to constitute a gift; and no strained and artificial construction of a supplementary statute should be indulged to tax as a gift a transfer actually lacking donative intent."

Record pp. 57-58.

BRIEF AND ARGUMENT.

Summary Statement.

The following is a summary statement of respondent's argument:

1. Section 501 of the Revenue Act of 1932 levies an excise upon the transfer of property by gift. No tax is levied upon any transfer unless it amounts in fact and in law to a substantive gift. The statute has been construed and so limited by express decisions of this Court.

Bromley v. *McCaughn*, 280 U. S. 124.

Burnett v. *Guggenheim*, 288 U. S. 280.

2. Section 503 of the Revenue Act of 1932 levies no tax in addition to the excise created by Section 501. Its obvious purpose is to prevent evasions of the tax created by Section 501 by declaring the difference in values taxable as a gift where property is sold or transferred for a consideration in money or money's worth and an inadequate consideration is received by the transferor. The legislative history of Section 503 discloses that its intended application was illustrated in the House and Senate Reports as follows:

> "For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000."
>
> House Report No. 708, 72nd Congress, 1st Session, p. 29.
>
> Senate Report No. 665, 72nd Congress, 1st Session, p. 41.

3. If Section 503 of the Revenue Act of 1932 is construed so as to require the payment of a gift tax upon transactions which are not gifts in substance, the statute

as so construed and applied would violate the Fifth Amendment of the Constitution of the United States. Congress cannot tax as a gift that which is not a gift by calling it such.

Heiner v. *Donnan*, 285 U. S. 312.
Helvering v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

4. The contract between respondent and Mrs. More was an arm's length transaction and was not taxable under Treasury Regulations 79, Article 8, interpreting Section 503 of the Revenue Act of 1932. Under these regulations a transaction which is *bona fide*, at arm's length, and free from any donative intent, is considered as made for an adequate and full consideration in money or money's worth in the ordinary course of business, and is excluded from Section 503. All of these elements exist in the present case.

Lasker v. *Commissioner*, 138 F. 2d 989.
Jones v. *Commissioner*, 1 Tax Court 1207.

5. If Section 503 of the Revenue Act of 1932 is applicable to the present case the surrender by Mrs. More of a vested interest in a life income was an adequate and full consideration in money or money's worth for the transfer of the corporate stock to her by respondent. The statute does not require that the consideration be received by the transferor; it merely provides for the existence of a consideration capable of being appraised in money or money's worth. A detriment is sufficient consideration to support a contractual obligation and if the detriment be capable of valuation in money or money's worth it meets the express requirements of Section 503 of the Revenue Act of 1932. If the language of a taxing statute is doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Similar language relating to deductions

from the estate tax has been generally construed by the courts in accordance with respondent's insistence.

Hendrick v. *Lindsay*, 3 Otto 143.
Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602.
U. S. v. *Merriam*, 263 U. S. 179.
Taft v. *Commissioner*, 92 F. 2d 667.
U. S. v. *Mitchell*, 74 F. 2d 571.
Porter v. *Commissioner*, 60 F. 2d 673.
Commissioner v. *Bryn Mawr Trust Co.*, 87 F. 2d 605.
Carney v. *Benz*, 90 F. 2d 247.

6. If section 503 of the Revenue Act of 1932, is applicable and requires the payment of a gift tax computed on the difference in values, respondent insists that there is ample evidence in the record to ascertain the value of the life income surrendered by Mrs. More. On the other hand, if additional evidence is required or deemed desirable the cause should be remanded to the tax court for the production of such evidence.

Ithaca Trust Co., Exr., v. *U. S.*, 279 U. S. 151.
Guggenheim v. *Helvering*, 117 F. 2d 469.
Commissioner v. *Marshall*, 125 F. 2d 943.
Helvering v. *Taylor*, 293 U. S. 507.
Guggenheim v. *Rasquin*, 312 U. S. 254.

ARGUMENT.

I.

The Tax Is Levied Only upon Gifts.

Section 501(a) of the Revenue Act of 1932, is as follows:

> "For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in Section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift."

By the foregoing section the tax is levied only upon "the transfer * * * of property by gift." The right to make a gift is but one of the many incidents of the ownership of property. The question presented in the present case is not whether Congress had the power to levy an excise tax upon the transfer of property in the consideration of marriage, or whether it had the power to tax a transfer where the consideration was the surrender of property not accruing to the transferor but amounting to a legal detriment to the transferee. In the language of Mr. Justice Frankfurter:

> "This case presents the narrow question of what Congress did, not what it could do."
>
> *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

The gift tax was first enacted in 1924. In construing the nature and extent of the tax imposed by the language "the transfer by * * * gift" (Section 319 of the Revenue Act of 1924), this Court expressly held that the tax was levied upon the single incident of the right to transfer property to another as a gift, pointing out at the same time that all of the other rights and powers incident to the ownership of property were free of the tax.

"It is a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another. Under this statute all the other rights and powers which collectively constitute property or ownership may be fully enjoyed free of the tax."

Bromley v. *McCaughn*, 280 U. S. 124.

In a subsequent case this Court pointed out that the statute was aimed only at transfers of title having the quality of a gift.

"The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the Trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall."

Burnett v. *Guggenheim*, 288 U. S. 280.

Respondent therefore had the right to sell or transfer his stock in any manner he saw fit without incurring any liability for the gift tax except in the single instance where the transfer was by way of gift. The legal concept of a transfer by gift is clearly defined. It is a voluntary transfer without consideration.

Petitioner apparently concedes that the transfer here involved is not taxable under the excise levied by Section 501 for the reason that there was no transfer by gift. The Tax Court found that no taxable gift was made under Section 501, saying:

"We agree with petitioner's contention that the agreement to marry constituted valuable consideration for the transfer. *Prewit* v. *Wilson*, 103 U. S. 22; *Barnum* v. *LeMaster*, 110 Tenn. 638, 75 S. W. 1045; hence no taxable gift was made if only section 501(a), *supra*, be considered. We pass at once, therefore to the other contentions of the parties."

Record p. 11.

II.

Section 503 Levies No Additional Tax.

Section 503 of the Revenue Act of 1932, levies no tax in addition to the excise created by Section 501. Section 503 of the Revenue Act of 1932, is as follows:

> "*Transfer for Less than Adequate and Full Consideration.*—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

The language of the above section manifestly is intended only to prevent evasions of the excise created by Section 501. There is nothing unusual about such legislative devices. It is equally clear, however, that a section designed only to prevent evasions may not be construed so as to extend the class of transactions selected by Congress for taxation. Taxing statutes are not to be extended by implication beyond the clear import of the language used.

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould* v. *Gould*, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53. The rule is stated by Lord Cairns in *Partington* v. *Atty. Gen.*, L. R. 4 H. L. 100, 122."
>
> *U. S.* v. *Merriam*, 263 U. S. 179, 187.

The general intention to tax a transaction cannot be enforced by the courts in the absence of language which can be reasonably construed to effect it.

> "* * * It may be that Congress had a general intention to tax all incomes, whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication. *Treat* v. *White*, 181 U. S. 264, 267, 45 L. Ed. 853, 854, 21 Sup. Ct. Rep. 611; *United States* v. *Field*, 255 U. S. 257, 65 L. Ed. 617, 41 Sup. Ct. Rep. 256; *Gould* v. *Gould*, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53."
>
> *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 605-606.

Section 503 by its caption includes only transfers "for less than adequate and full consideration." In the present case it must be conceded that the transfer of the stock was based upon both an *adequate* and a *full* consideration. The words used in Section 503 considered in their customary meaning limit the section to transactions where property is sold or transferred for a consideration in money or money's worth and a difference in values exists. It provides that such difference in values shall "be deemed a gift." Clearly Congress contemplated that persons intending to make a gift but desiring to evade the tax might cloak the transaction as either a sale or exchange of property, and Congress sought to penetrate the subterfuge by declaring that the difference between the values of the property transferred was to be deemed a gift and to that extent taxable under Section 501.

Manifestly Section 503 is inapplicable unless it appears (a) property has been sold or exchanged, (b) the consideration received in the sale was less than the actual

value, or the property received in exchange was less valuable than that transferred, and (c) that to the extent of such difference a donative intent existed.

The legislative history of Section 503 clearly discloses that it should be given this limited construction. This originated in the Revenue Act of 1924 as Section 320 thereof, and was as follows:

> "If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

When the Revenue Act of 1932 was passed the provisions previously found in Section 320 of the Revenue Act of 1924 were divided into two sections. The first sentence of Section 320 of the Revenue Act of 1924 became a section (Section 506) of the Revenue Act of 1932, reading as follows:

> "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

The remaining language of Section 320 of the Revenue Act of 1924 became Section 503 of the Revenue Act of 1932, the language being changed from:

> "Where property is sold or exchanged for less than a fair consideration in money or money's worth * * *"

to

> "Where property is transferred for less than an adequate and full consideration in money or money's worth * * *."

The word "transferred" was merely substituted as the equivalent of "sold or exchanged," and should be so construed.

The Committees' comments, found in both the Senate and the House Report, relating to the intent and purpose of Section 503, clearly indicate that this section was never intended to broaden the excise, its purpose being merely to "reach all transfers to the extent that they are donative." This explanation was in the following language:

> "Section 503. *Transfers for Less Than Adequate and full Consideration.*—Since the tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000."
>
> House Report No. 708, 72nd Congress, First Session, p. 29.
>
> Senate Report No. 665, 72nd Congress, First Session, p. 41.

The example chosen by the Committees to illustrate the application of Section 503 conclusively demonstrates that Congress intended it to prevent *evasions* of Section 501 where transactions donative in purpose were clothed as sales or exchanges of property. Most gifts generally recite that they are made in consideration of love and af-

fection. Congress clearly intended to tax such transfers notwithstanding the statement of such a consideration because they were donative in character.

In the present case respondent transferred the stock in consideration of Mrs. More's voluntary surrender of a vested property right resulting from her marriage to respondent. The transfer of the stock was based upon the concomitant consideration of the promise to marry and the surrender of a life income under an existing trust fund. The Tax Court made no finding of any donative intent and the facts found by the Tax Court negatived the existence of donative intent.

Respondent insists that Congress in enacting Section 503 never intended that a transfer for a valuable and adequate consideration involving no donative intent should "be deemed a gift."

III.

Congress Cannot Tax As a Gift That Which Is Not a Gift by Calling It Such.

If Section 503 of the Revenue Act of 1932 should be construed—as petitioner apparently insists—so as to require transactions which are not gifts in substance, nor mere colorable evasions, to be nevertheless taxed *as if they were gifts*, the statute as so construed and applied would violate the Fifth Amendment to the Constitution of the United States.

Congress in the exercise of its power to prevent evasions may not arbitrarily declare *bona fide* transfers for a valuable consideration to be taxable as gifts. Its power to prevent evasions must be reasonably exercised and it cannot be arbitrarily extended to embrace transactions except where reasonably required to prevent evasions.

In *Hoeper* v. *Tax Commission*, 284 U. S. 206, this Court considered an income tax statute of Wisconsin, one section of which expressly provided that the income of a wife should be deemed the income of the husband and taxable as such. The court held that as so construed the act violated the constitutional requirement of due process of law, saying:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. *That which is not in fact the taxpayer's income cannot be made such by calling it income.*"

In *Heiner* v. *Donnan*, 285 U. S. 312, this Court struck down a section of the Revenue Act of 1926 as violative of constitutional provisions because it provided that transfers made within two years prior to death were to be deemed and held to have been made in contemplation of death and therefore a part of the taxable estate without regard to the actual facts. The Court had previously rendered a similar decision in the Schlessinger case (involving a six-year period prior to death). The principle involved was stated in the following language:

> "The presumption was held invalid upon the ground that the statute made it conclusive without regard to actualities, while like gifts at other times were not thus treated; and that there was no adequate basis for such a distinction. 'The presumption and consequent taxation,' the court said (p. 240), 'are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, "A" may be required to submit to an enactment forbidden by the Constitution if this seems

necessary in order to enable the State readily to collect lawful charges against "B." Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.' "

The doctrine was recently reaffirmed in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85. The Revenue Act of 1926 provided that the gross estate of a decedent should include property transferred in trust prior to death if the enjoyment thereof was subject at the date of death to any change through the exercise of a power either by a decedent alone or in conjunction with any other person to alter, amend or revoke the transfer. In determining the validity of the statute this Court said:

> "Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted is appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, *if reasonably requisite to prevent evasion*, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, *are unreasonably harsh or oppressive*, when viewed in the light of the expected benefit, *or arbitrarily ignore recognized rights to enjoy or to convey individual property*, the guaranty of due process is infringed."

While the court found the statute valid because it was reasonably necessary to prevent evasions of the estate tax as applied in the circumstances of the case considered, it further said:

> "There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in contemplation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment. In the same category falls a statute seeking to tax the separate income of a wife as income of her husband."

If Section 503 is construed under the facts of the present case to render the transaction taxable as a gift it will be contrary to the actualities and will create a fictitious status under the guise of supposed necessity. It would therefore be unreasonably harsh and oppressive and would arbitrarily ignore recognized rights to enjoy and to convey individual property for a valuable and adequate consideration and would violate the guaranty of due process of law as contained in the Fifth Amendment to the Constitution of the United States.

IV.

The Transaction Was at Arm's Length.

The contract between respondent and Ellen Stokes More was an arm's length transaction. Respondent was sixty-three years old (R. 21). He married first in 1919 and his wife died in 1934, leaving two children. Mrs. More was forty-four years of age (R. 22). She first married in 1925 and her husband died in 1934, leaving a son surviving. The contract resulted from careful consideration by these two mature persons, due to a prospective financial loss resulting from a second marriage under the provisions of the trust indentures executed by Mrs. More's

first husband in 1927 and 1929. It was the result of calm deliberation intended to repair a financial loss. It was executed prior to the marriage and Mrs. More was represented by her father, an attorney, who prepared the contract and in whose office it was executed. After being executed by the contracting parties, it was acknowledged before a notary public and was then registered in the register's office of Davidson County, Tennessee (R. 22).

Treasury Regulation 79, Article 8, interpreting Section 503 of the Revenue Act of 1932, contains the following language:

> "However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth."

The legal detriment being a consideration reducible to money value, and the tax court having clearly found facts completely negativing donative intent, under the foregoing treasury regulations the court will not inquire into any possible differences in value but must consider the transfer as having been made for an adequate and full consideration in money or money's worth.

Lasker v. *Commissioner*, 138 F. 2d 989.
Jones v. *Commissioner*, 1 Tax Court 1207.

In *Lasker* v. *Commissioner, supra,* in applying Treasury Regulation 79, Article 8, to an analogous situation, the Seventh Circuit said:

> "Furthermore, we are of the view that respondent's contention must be denied because of the proviso contained in Treasury Regulation 79, Article 8, as follows: *'However, a sale, exchange, or other transfer of property made in the ordinary course of busi-*

ness (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth.' It is not disputed by respondent, in fact we understand it to be conceded, that the transaction in controversy comes clearly within the language of this proviso. Each of the parties was represented by counsel, each was advised as to his or her rights, and especially was petitioner's wife informed as to the total value of petitioner's property. With such knowledge they bargained and produced a result evidently satisfactory to both. The presence of counsel at the conference table for the purpose of advising and representing the respective parties as to their rights and obligations, together with other relevant facts and circumstances, dispels any rational theory that a payment made in connection with such settlement was intended for or could have been a gift."

In *Jones* v. *Commissioner*, 1 Tax Court 1207, the Tax Court held specifically that any assessable tax was that imposed by authority of Section 501. The Court further held, under analogous facts, that the transaction was an arm's length transaction excluded from taxation by the Treasury regulations. We quote from the opinion as follows:

"The husband and wife here, acting through their respective attorneys, negotiated a settlement of the wife's right to maintenance and support. The settlement was unquestionably an arm's length transaction for consideration, with no suggestion of donative intent or purpose. *Hensley* v. *Hensley*, 170 Cal. 284, 183 Pac. 445. * * *

"We do not agree with the broad position taken by respondent that a transfer under such circumstances and without donative intent may be subject to gift tax. As the Second Court said in *Commissioner* v. *Hyde*, 82 F. 2d 174 (36-1 U. S. T. C., Par. 9156), in answer to an argument that a trust established for the benefit of a

wife under somewhat similar circumstances was a gift, 'to hold that the trust was established as a voluntary gift * * * would be to close one's eyes to the realities.'

* * * * * * *

"But aside from that frailty, we think the present transfer was not within the purview of section 503, *supra*. That section can scarcely mean that all arm's length business transactions, involving transfers of property, shall be subjected to scrutiny and, in every case where one party makes a bad bargain, he should have his misfortune increased by the imposition of a gift tax on his unfavorable balance from the transaction. The tax is imposed by authority of section 501. It is expressly limited to transfers 'by gift.' 'Gift' is not defined in the statute. The respondent, however, has himself defined the term as used in the controlling statute as excluding arm's length business transactions, such as is evidenced here, in which there was no donative intent. Regulations 79, Articles 1, 2 and 8, approved October 30, 1933, and articles 1, 2 and 8 of the same regulations, approved February 26, 1936. See *L. W. Mesta*, 42 B. T. A. 933; reversed, 123 F. 2d 936; certiorari denied, 316 U. S. 695; *Walter S. Halliwell, supra*. We think that is correct."

1 Tax Court, pp. 1207, 1212.

It was further argued by the respondent (in the above case) that no value was established for the wife's right to maintenance and support in satisfaction of which the transfer in question was made. It was insisted that, in the absence of specific proof as to the value of the wife's right, the entire transfer was taxable. This contention was rejected.

"Again we do not agree. The very fact that the attorneys representing petitioner's wife in dealing at arm's length with his attorneys were able to exact a payment of $222,643 in settlement of his obligation is

persuasive evidence to us of the value of her right. The amount which the court, in the absence of the agreement, would have been called upon to award to petitioner's wife from his estate would have been based upon his income and the station in life in which he would reasonably be required to maintain his wife. The net income of petitioner for the 10 consecutive years ending with that in which the settlement occurred, averaged $110,000 for each year. At the time the settlement was effected, his income was increasing and the amount paid was little more than his net income for the current year. Thus, not only was the contested payment made as a result of a settlement negotiated at arm's length in which an adequate consideration will be presumed (*Commissioner* v. *Mesta*, 123 F. 2d 986), but the record affirmatively indicates that the settlement was financially favorable to petitioner. See *Young* v. *Young*, 323 Ill. 608, 155 N. E. 405; *Rice* v. *Rice*, 256 Mich. 287, 239 N. W. 256; *Miller* v. *Miller*, 90 Ind. App. 359, 168 N. E. 881; *Owens* v. *Owens*, 20 Ohio App. 518, 152 N. E. 767; *Harden* v. *Harden*, 77 Pac. 2d 721 (Okla.)."

Jones v. *Commissioner*, 1 Tax Court, pp. 1211-12.

Surely if an agreement between a husband and wife negotiated in connection with pending divorce proceedings is an arm's length transaction for a consideration with no suggestion of donative intent or purpose (as in the above quoted case), then a transaction between a mature widower and a mature widow under which, in consideration of marriage, the widower legally obligated himself to make good and compensate for a financial loss thereby sustained by the widow pursuant to the provisions of a trust set up by her former husband would likewise be an arm's length transaction with no suggestion of donative intent or purpose.

The agreement was not in the nature of a family settlement as it did not involve any settlement of property

rights which would become vested in Mrs. More by reason of her marriage to respondent. The agreement related solely to property rights vested in previous years under a trust created by a former husband. Mrs. More was the owner of a vested property right, to-wit, an income for life. A contract relating to these vested property rights and providing compensation for the loss thereof was literally a business transaction and manifestly could not be considered a family settlement since it related to Mrs. More's property rather than to marital rights which she might acquire in respondent's property.

There is no proof in the record to show that Mrs. More had any knowledge of the terms and provisions of the will executed by respondent after the marriage, or that this will had any relationship to the contract entered into between the parties prior to the marriage. Respondent was merely asked on cross examination whether or not after the marriage he had executed a will, leaving a certain farm to his widow for life or during widowhood and creating a certain trust for the benefit of his widow and surviving children in which certain of the trusts were reduced by the value of 11,139 shares of stock of General Shoe Corporation. Respondent testified that he had executed such a will (R. 25). No proof of the value of the farm or the value of the personal estate was offered. The will manifestly represented respondent's views of an equitable disposition of his estate as of the time it was made. It was subject to change at any time prior to his death. It did not deprive the surviving widow of her statutory rights in his estate guaranteed to her by the laws of Tennessee and which she was free to assert by dissenting from the will.

Section 8358 of the Code of Tennessee.

V.

Meaning of "Consideration."

Section 503 of the Revenue Act of 1932 refers to transfers "for less than an adequate and full consideration in money or money's worth," without restrictive limitations or qualifications upon the term "consideration." The word "consideration" (in the absence of express limitations) has been defined by this Court from its earliest decisions to the present date as including not only a benefit to the promisor but also loss or detriment to the promisee. In *Hendrick* v. *Lindsay*, 3 Otto 143, decided in 1876, this Court said:

> "It is argued that Hendrick had no personal interest in the matter, and that, therefore, there was no consideration for his promise. But damage to the promisee constitutes as good a consideration as benefit to the promisor. In *Pillans* v. *Van Mierop*, 3 Burr. 1663, the court say, 'That any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise and will make it binding, although no actual benefit accrues to the party promising.' This rule is sustained by a long series of adjudged cases."

It would seem that the following pertinent comment of Disney, J., in dissenting from the Tax Court opinion, adequately disposes of any contrary contention:

> "An interest in a trust which had for the last six years produced about $5,000 per year can hardly be denominated without money's worth. I find no reason, either in the words of the statute or in the requirement of the situation sought to be covered by the statute, to desert the long respected concept of 'consideration.' Why not take the law as we find it?"
>
> Record p. 17.

Section 320 of the Revenue Act of 1924 (the antecedent of Section 503 in the Revenue Act of 1932), which manifestly related only to sales or exchanges of property, required the tax to be levied on the amount by which the fair value of the property "exceeded the consideration *received.*" It is significant that when the gift tax was reenacted in 1932 the word "received" was entirely omitted from Section 503. Commenting on this situation, Paul, in his work "Federal Estate and Gift Tax ..ion," says:

> "The analogous section of the 1924 Act seemed to require that the consideration should pass to the transferor. The present law offers no explicit answer one way or the other, and the regulations are of no aid. The Treasury, however, in cases involving the estate tax, has contended that the consideration must be received by the taxpayer. The courts, as a rule, have held to the contrary."
>
> Paul, Federal Estate and Gift Taxation, Vol. 2, Sec. 16.14, p. 1114.

The numerous decisions of the various Circuit Courts of Appeals involving interpretation of similar language contained in Section 303(a)(1) of the Estate Tax, support Mr. Paul's statement. In *Commissioner* v. *Porter,* 92 F. 2d 426 (affirmed subsequently by this Court on other grounds in 288 U. S. 436), the Second Circuit said:

> "The Commissioner asks us to construe section 303(a)(1) as though the words 'adequate and full consideration in money or money's worth' were followed by the phrase 'received therefor by the decedent.' Such a construction has been several times rejected both by the courts and by the Board of Tax Appeals in cases involving guaranties. *Carney* v. *Benz,* 90 F. 2d 747 (C. C. A. 1); *United States* v. *Mitchell,* 74 F. 2d 571 (C. C. A. 7); *Porter* v. *Commissioner,* 60 F. 2d 673, 675 (C. C. A. 2), dictum; *Eckhart* v. *Commissioner,* 33 B. T. A. 426."

The case of *Taft* v. *Commissioner,* reported by this Court in 304 U. S. 351, involved a number of claims for deductions which were allowed by the United States Circuit Court of Appeals for the Sixth Circuit, and with respect to which no question of that decision was made in this Court. In considering and allowing these claims the Sixth Circuit rejected the Commissioner's contention and used the following language:

> "* * * In respect to pledges which were contingent upon sums being contributed by others equal to or in excess of the decedent's pledge the consideration is money, and in respect to other claims such as annuities in return for the transfer of the Cincinnati Conservatory of Music to the Institute of Arts and the work of scientific men in a research and publishing enterprise, the consideration is property or services. The argument of the Commissioner in respect to them is that the statute contemplates that consideration must move to the decedent and augment her estate, and that the claims must arise in financial or business transactions. There is some such view indicated by Judge Hickenlooper in the *Latty Case, supra.* It is but dictum, however, and even so that is recognition that: 'There are instances in which it is practically impossible to say that a fair consideration is not to be regarded as a consideration in money or money's worth'—citing *Ferguson* v. *Dickson,* 300 Fed. 961 (C. C. A. 3). The weight of authority, however, is clearly to the effect that deductions for claims are nowhere in the statute conditioned upon the consideration supporting them moving to the decedent, although in the usual case that situation will probably exist. The phrasing of the statute is clear, and we see no necessity for reading into it a condition not there expressed. This is the view held by most of the courts which have had occasion to interpret the section. 'We need not limit it to cases where the consideration passes to the testator,' *Porter* v. *Commissioner, supra,* and to the same effect *United States*

v. *Mitchell, supra, Commissioner* v. *Bryn Mawr Trust Co., supra,* and the recent case of *Carney* v. *Benz,* 90 F. 2d 747, 749 (C. C. A. 1)."

Taft v. *Commissioner,* 92 F. 2d 667, 670.

Numerous other decisions are cited in our summary statement showing that the various Circuits have with practical unanimity interpreted the word "consideration" in its usual legal significance. Indeed, the more recent decisions indicate that the Commissioner has abandoned the often made insistence that consideration should be limited to benefits flowing to the transferor.

In *Commissioner* v. *Wragg,* 141 F. 2d 648, the First Circuit on March 6, 1944, made the following comment:

"* * * Neither does he again urge, as he has so many times in the past, always in vain, that the deductions taken cannot be allowed because the consideration for the claims against the estate did not flow to the decedent. See *Estate of Borland,* 38 B. T. A. 598, 603; *United States* v. *Mitchell,* 7 Cir., 74 F. 2d 571, 574; *Commissioner* v. *Kelly's Estate,* 7 Cir., 84 F. 2d 958, 964; *Carney* v. *Benz,* 1 Cir., 90 F. 2d 747, 749, 113 A. L. R. 365; *Commissioner* v. *Porter,* 2 Cir., 92 F. 2d 426, 427; *Commissioner* v. *Weiser,* 10 Cir., 113 F. 2d 486, 487."

Respondent therefore respectfully insists that there was no error in the holding by the Circuit Court of Appeals that the word "consideration" included not only benefits flowing to the transferor but also any loss or detriment sustained by the transferee.

VI.

Proof of Value.

The Circuit Court of Appeals for the Sixth Circuit reached the conclusion that the court was required to go

no further than to ascertain that the property rights surrendered by Mrs. More were quite substantial in money's value and were a sufficiently real consideration in money's worth to negative a gift motive concept in the excess in value of the property transferred (R. 58). It predicated this conclusion upon the reasoning found in *Lasker* v. *Commissioner*, 138 F. 2d 989, previously referred to and quoted from in this brief.

Petitioner insists, however, that the Sixth Circuit was in error on this phase of the case and contends that the deficiency assessment should be upheld because of the failure of the respondent to produce proof with respect to the actual value of the income surrendered by Mrs. More. The property right surrendered by Mrs. More was the right to the income for life from certain corporate stocks known as The Arcade Company. The capital value of The Arcade stocks was obviously not material since Mrs. More's rights attached only to such *earnings* as were distributed in dividends. The stock could have exceeded the market value of the General Shoe Corporation stock which was transferred to Mrs. More without affecting the value of her life interest which attached only to distributed earnings. Respondent offered evidence as to the earnings of The Arcade Company received by her under the trust during the entire life of the trust (February 9, 1934, through June 20, 1939), and the Tax Court specifically found that during this period Mrs. More had received a total of $29,428.89 (R. 10). Mrs. More was forty-four years of age and such earnings, capitalized in accordance with Treasury Regulations 29, Table A, would reflect a value of $77,500.

If a taxable gift was made because of a difference in values, these values were required to be estimated as of the date of the transaction in question. Clearly testimony of income distributed during the entire life of the

trust was sufficiently substantial testimony on which to calculate the value of a life annuity, and this is particularly true *in the absence of any countervailing testimony*. Petitioner suggests that proof might have been offered relating to the existing management of the corporation, its financial solvency and future prospects. The record of dividends paid during the life of the trust correctly reflects the stability of the management and no better evidence could be obtained showing the solvency of the corporation. Evidence as to whether or not the corporation would continue to pay dividends throughout the future years would be highly speculative and certainly would not be as reliable as the dividend record during the life of the trust over a number of years.

The cases cited by the petitioner relating to the obligation upon the respondent to overcome the *prima facie* value established by the Commissioner's appraisal are not in point in the present case *because no findings as to the value of the life income surrendered by Mrs. More have ever been made by the Commissioner*. Both the Commissioner and the Tax Court proceeded upon a legal theory which rendered any such findings wholly immaterial.

In *Guggenheim* v. *Helvering*, 117 F. 2d 469, the Circuit Court of Appeals for the Second Circuit remanded the case to the Tax Court for an appraisal of an interest in a partnership even though such an appraisal was attended with many difficulties and speculations, saying:

> "The law is not so helpless; situations again and again present themselves where, after all shifts are exhausted, rather than permit certain injustice, a tribunal will make the best reckoning that the facts admit though fully conscious of its infirmities. Trials to a jury abound in such instances and custom has long indurated us to them. The Supreme Court has recently recognized the propriety of so proceeding in

other connections. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 60 S. Ct. 631, 84 L. Ed. 825; *Palmer* v. *Connecticut Railway & Lighting Co.*, 61 S. Ct. 379, 85 L. Ed. ____. In the appraisal of property for taxation courts have also escaped from the same dilemma by allowing themselves the necessary latitude. *Helvering* v. *Taylor*, 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623; *Cohan* v. *Commissioner*, 2 Cir., 39 F. 2d 540; *Conrad & Co.* v. *Commissioner*, 1 Cir., 50 F. 2d 576; *Davison* v. *Commissioner*, 2 Cir., 60 F. 2d 50; *B. F. Sturtevant Co.* v. *Commissioner*, 1 Cir., 75 F. 2d 316, 323, 324. *The Board made no allowance for these factors, apparently supposing that the taxpayer was bound to show not only that the deficiency assessed against her was wrong, but by how much.* The cases just cited hold the contrary, and so do *Sioux City Stock Yards Co.* v. *Commissioner*, 8 Cir., 59 F. 2d 944; *Laird* v. *Commissioner*, 3 Cir., 85 F. 2d 598, 600, 601; and *Clements* v. *Commissioner*, 8 Cir., 88 F. 2d 791, 793. The case must be remanded for the reappraisal of the decedent's interest in the 'Old Firm' in accordance with the foregoing" (Emphasis added).

117 F. 2d at p. 474.

Again, in *Commissioner* v. *Marshall*, 125 F. 2d 943, where it was contended that the fixing of values by the application of mortality tables to a life expectancy was speculative in that it did not take into consideration the possible decline in values of the property or the unexpected termination of the life, the court said:

"With reference to the taxation of life estates, the Supreme Court has relied on educated guesses, as of a given date, based on the mortality tables, disregarding the fact that actually, in the particular case before it, the prophecy has turned out to be wrong because the life tenant did not live up to her life expectancy. 'Like all values, as the word is used by the law, it depends largely on more or less certain

> prophecies of the future; and the value is no less real * * * if later the prophecy turns out false than when it comes out true.' *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155, 49 S. Ct. 291, 292, 73 L. Ed. 647. The rationale of that case is controlling here. Treasury Regulations 79, Article 19, adopts the actuarial method of valuing remainders. That method is not so arbitrary as to be unreasonable and invalid."
>
> 125 F. 2d at p. 946.

It therefore appears from the above authorities that Treasury Regulation 79 is in legal effect an adoption by the Treasury Department of the method of valuing future interest by the simple application of the mortality tables. If any tax is due under the facts of this case, it would seem that such course should have been followed by the Tax Court.

At all events, if it appears that the Commissioner and the Tax Court proceeded upon the wrong legal theory and that the tax deficiency as assessed was invalid, respondent should be given an opportunity to make an appropriate application for a further hearing by the Tax Court for the purpose of offering evidence on values which under the Tax Court's theory if offered would have necessarily been rejected. This appears from the opinion of this Court in *Helvering* v. *Taylor*, 293 U. S. 507, in which this Court said:

> "* * * Frequently, if not quite generally, evidence adequate to overthrow the commissioner's finding is also sufficient to show the correct amount, if any, that is due. See, *e. g.*, *Darcy* v. *Commissioner of Internal Revenue*, (C. C. A. 2d) 66 F. 2d 581, 585. But, where as in this case the taxpayer's evidence shows the commissioner's determination to be arbitrary and excessive it may not reasonably be held that he is bound to pay a tax that confessedly he

does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the board should have held the apportionment arbitrary and the commissioner's determination invalid. Then, upon appropriate application that further hearing be had, it should have heard evidence to show whether a fair apportionment might be made and, if so, the correct amount of the tax. The rule for which the commissioner here contends is not consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals. The Circuit Court of Appeals rightly reversed and remanded the case for further proceedings in accordance with its opinion."

79 L. Ed. at p. 629.

This is particularly true in the present case in view of the fact that prior to the taking of any testimony the Presiding Judge of the Tax Court called upon the parties to make a statement of their respective contentions. The statement of the petitioner's contention in effect limited the hearing to the narrow question of whether or not a transfer in consideration of a promise of marriage was a consideration reducible to money or money's worth (R. 20-21). A reference to the record further discloses that counsel for the respondent understood the statement of petitioner's counsel to eliminate all question of the actual value of the annuity surrendered by Mrs. More.[1]

CONCLUSION.

Petitioner finally rests a substantial portion of his contention upon the statement that unless the value of the property transferred in the present case is taxable as if it were a gift, it will perhaps escape further taxa-

[1]See colloquy between court and counsel, record 24-25.

tion under both the gift tax and under the inheritance tax. The contention involves the assumption that Congress has levied a tax upon every transfer and that irrespective of character all transfers must be so construed as to bring them under some form of taxing statute—either the gift tax or the estate tax. It is urged that unless the court takes this view of the law the respondent in the present case will "*avoid*" the payment of a gift tax. It should be noted that no contention is made that respondent has attempted to *evade* the payment of such a tax by a subterfuge or a cloak. This Court has always distinguished between a mere *avoidance* of a tax and an *evasion* of a tax.

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."
>
> *Gregory* v. *Helvering*, 293 U. S. 465.

It is therefore respectfully submitted that there is no error in the opinion of the Circuit Court of Appeals for the Sixth Circuit and its decision should be affirmed by this Court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 629.—October Term, 1944.

Commissioner of Internal Revenue, Petitioner, *vs.* William H. Wemyss.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 5, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In 1939 taxpayer proposed marriage to Mrs. More, a widow with one child. Her deceased husband had set up two trusts, one half the income of which was for the benefit of Mrs. More and the other half for that of the child with provision that, in the event of Mrs. More's remarriage, her part of the income ceased and went to the child. The corpus of the two trusts consisted of stock which brought to Mrs. More from the death of her first husband to her remarriage, about five years later, an average income of $5,484 a year. On Mrs. More's unwillingness to suffer loss of her trust income through remarriage the parties on May 24, 1939, entered upon an agreement whereby taxpayer transferred to Mrs. More a block of shares of stock. Within a month they married. The Commissioner ruled that the transfer of this stock, the value of which, $149,456.13, taxpayer does not controvert, was subject to the Federal Gift Tax, §§ 501 and 503 of the Revenue Act of 1932, 47 Stat. 169, 245, 247, 26 U. S. C. §§ 1000, 1002. Accordingly, he assessed a deficiency which the Tax Court upheld, 2 T. C. 876, but the Circuit Court of Appeals reversed the Tax Court, 144 F. 2d 78. We granted certiorari to settle uncertainties in tax administration engendered by seemingly conflicting decisions. 323 U. S. —.

The answer to our problem turns on the proper application of §§ 501(a) and 503 *supra* to the immediate facts. These provisions are as follows:

> "Sec. 501. Imposition of Tax.
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual . . . of property by gift."

> "Sec. 503. TRANSFERS FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.
> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

In view of the major rôle which the Tax Court plays in federal tax litigation, it becomes important to consider how that court dealt with this problem. Fusing, as it were, §§ 501 and 503, the Tax Court read them as not being limited by any common law technical notions about "consideration". And so, while recognizing that marriage was of course a valuable consideration to support a contract, the Tax Court did not deem marriage to satisfy the requirement of § 503 in that it was not a consideration reducible to money value. Accordingly, the Court found the whole value of the stock transferred to Mrs. More taxable under the statute and the relevant Treas. Reg. 79 (1936 ed.) Art 8: "A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift." In the alternative, the Tax Court was of the view that if Mrs. More's loss of her trust income rather than the marriage was consideration for the taxpayer's transfer of his stock to her, he is not relieved from the tax because he did not receive any money's worth from Mrs. More's relinquishment of her trust income, and, in any event, the actual value of her interest in the trust, subject to fluctuations of its stock earnings, was not proved. One member of the Tax Court dissented, deeming that the gift tax legislation invoked ordinary contract conceptions of "consideration".

The Circuit Court of Appeals rejected this line of reasoning. It found in the marriage agreement an arm's length bargain and an absence of "donative intent" which it deemed essential: "A donative intent followed by a donative act is essential to constitute a gift; and no strained and artificial construction of a supplementary statute should be indulged to tax as a gift a transfer actually lacking donative intent." 144 F. 2d 78, 82.

Sections 501 and 503 are not disparate provisions. Congress directed them to the same purpose, and they should not be separated in application. Had Congress taxed "gifts" *simpliciter*, it

would be appropriate to assume that the term was used in its colloquial sense, and a search for "donative intent" would be indicated. But Congress intended to use the term "gifts" in its broadest and most comprehensive sense. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27; S. Rep. No. 665, 72d Cong., 1st Sess., p. 39; cf. *Smith* v. *Shaughnessy*, 318 U. S. 176; *Robinette* v. *Helvering*, 318 U. S. 184. Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of "donative intent". It formulated a much more workable external test, that where "property is transferred for less than an adequate and full consideration in money or money's worth," the excess in such money value "shall, for the purpose of the tax imposed by this title, be deemed a gift . . . ". And Treasury Regulations have emphasized that common law considerations were not embodied in the gift tax.[1]

To reinforce the evident desire of Congress to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech, the Treasury Regulations make clear that no genuine business transaction comes within the purport of the gift tax by excluding "a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length, and free from any donative intent)." Treas. Reg. 79 (1936 ed.) Art. 8. Thus on finding that a transfer in the circumstances of a particular case is not made in the ordinary course of business, the transfer becomes subject to the gift tax to the extent that it is not made "for an adequate and full consideration in money or money's worth". See 2 Paul, Federal Estate and Gift Taxation (1942) p. 1113.

The Tax Court in effect found the transfer of the stock to Mrs. More was not made at arm's length in the ordinary course of business. It noted that the inducement was marriage, took account of the discrepancy between what she got and what she gave up, and also of the benefit that her marriage settlement brought to her son. These were considerations the Tax Court could justi-

[1] Treas. Reg. 79 (1936 ed.) Art. 1: "*Imposition of tax.*— . . . The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth."

fiably heed, and heeding, decide as it did. Its conclusion on the issue before it was no less to be respected than were the issues which we deemed it was entitled to decide as it did in *Dobson* v. *Commissioner*, 320 U. S. 489, *Commissioner* v. *Heininger*, 320 U. S. 467, *Commissioner* v. *Scottish American Co.*, 323 U. S. 119.

If we are to isolate as an independently reviewable question of law the view of the Tax Court that money consideration must benefit the donor to relieve a transfer by him from being a gift, we think the Tax Court was correct. See *Commissioner* v. *Bristol*, 121 F. 2d 129. To be sure, the Revenue Act of 1932 does not spell out a requirement of benefit to the transferor to afford relief from the gift tax. Its forerunner, § 320 of the 1924 Act, 43 Stat. 253, 314, was more explicit in that it provided that the excess of the transfer over "the consideration received shall . . . be deemed a gift." It will hardly be suggested, however, that in re-imposing the gift tax in 1932 Congress meant to exclude transfers that would have been taxed under the 1924 Act. The section taxing as gifts transfers that are not made for "adequate and full [money] consideration" aims to reach those transfers which are withdrawn from the donor's estate. To allow detriment to the donee to satisfy the requirement of "adequate and full consideration" would violate the purpose of the statute and open wide the door for evasion of the gift tax. See 2 Paul, *supra* at 1114.

Reversed.

Mr. Justice ROBERTS dissents, and would affirm the judgment for the reasons given in the opinion of the Circuit Court of Appeals.